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No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC. *et.al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF FOR GLOBAL EXCHANGE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

This brief will address the following questions, which are set forth within Question 1 of the petition for writ of certiorari:

I. Whether ensuring consumer confidence in corporate representations is in the public interest.

II. Whether a corporation's factual inaccuracies about the manufacture of its products are of material concern to consumers and affect consumers' purchasing decisions.

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INTEREST OF AMICUS

Global Exchange is a non-governmental human rights organization dedicated to promoting economic, social and environmental justice.[1] It has over 15,000 members nationwide. Global Exchange monitors multinational corporations to ensure they are accountable to consumers, workers, communities, and the environment. This case, which involves

[1] All parties have consented to the filing of this *amicus* brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no other counsel for a party authored this brief, in whole or in part, and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

the determination of the bounds of commercial speech, raises issues of fundamental interest to Global Exchange, its members, and all consumers.

SUMMARY OF ARGUMENT

Federal law has long recognized that ensuring the veracity of certain product claims by corporations is squarely in the public interest. For example, country of origin claims are regulated because some consumers prefer to purchase products made in the United States. Similarly, claims as to the recycled nature of a product's construction are regulated because some consumers prefer to purchase products made of recycled materials.

The statements at issue in this case are assertions about the labor component of Nike products—the manner in which the Nike brand shoes were assembled and the environmental and health effects of such manufacturing processes. According to the Respondent's complaint, the working conditions in Nike subcontract factories were harsh and unsafe for the employees. Respondent's Complaint cites instances in Nike subcontract factories of corporal punishment, the use of toxic solvents that exceed acceptable limits, and excessive working hours in violation of local labor codes. Despite these conditions, Nike made a series of statements that represented their subcontract factories as providing safe and healthy work environments.

Consumer choice about whether to buy a product is the function of several factors: use, price, availability, and other extra-functional characteristics of the product. Claims about the manner of production or composition of the product influence consumer purchasing decisions. For example, survey data from five academic studies conducted from 1995 to 1999 indicate that consumers will change purchasing behavior based on knowledge of "sweatshop" manufacturing practices. In surveys conducted by Marymount University

and the National Bureau of Economic Research, at least three-fourths of those polled stated that they would avoid purchasing goods if they knew that the goods were produced in unhealthy and unsafe working conditions. All five studies cited in this brief reported that at least three-fourths of survey respondents would pay more for an item that was guaranteed to be manufactured under safe and healthy working conditions.

Based on the survey data, a majority of consumers viewed the labor practices during a product's manufacture as an extra-functional characteristic that indeed influences their purchasing behavior. Just as a corporation can expect an economic boost from claiming that their product is "Made in the USA" or "environmentally friendly," a claim as to the safe and healthy working conditions during production would also have a positive effect on product sales.

Amicus urges the Court to affirm the decision of the California Supreme Court, which recognizes that corporate statements as to manufacturing and labor processes are not creative or political ideas, but inherently commercial speech.

ARGUMENT

I. THERE IS AN ESTABLISHED PUBLIC INTEREST IN ENSURING THAT CORPORATIONS TRUTHFULLY REPRESENT THE MAKE AND MANUFACTURE OF THEIR PRODUCTS.

U.S. law and practice recognize that it is in the public interest to establish a marketplace in which consumers can rely with confidence upon corporate product claims. For example, this Court has itself affirmed that it is in the public interest for consumers to have confidence in the accuracy of corporate product representation. *See 44 Liquormart v. Rhode Island*, 517 U.S. 484, 496 (1996) (noting the public's interest in receiving accurate commercial information); *Bates v. State of Ariz.*, 433 U.S. 350, 383 (1977) (stating that the

public and private benefits from commercial speech derive from confidence in its accuracy and reliability); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc.*, 425 U.S. 748, 771 (1976) ("[U]ntruthful speech commercial or otherwise, has never been protected by the first amendment[.]"). Laws and regulation have likewise limited the nature of corporate product expression to protect the consumer still further. *See* 15 U.S.C.A., Ch. 2 (creation of the Federal Trade Commission (FTC)); 16 C.F.R. § 260.5 (stating that § 5 of the FTC Act makes unlawful deceptive acts and practices in or affecting commerce.). *See also Floersheim v. Weinburger*, 346 F.Supp. 950, 957 (D.C. 1972) ("[T]he purpose of the FTC is to protect not just the sophisticated, but rather the vast multitude which includes the credulous . . . who, in making purchases, do not stop to analyze but are governed by appearances and general impressions").

Consumer purchasing decisions take into account manufacturer claims regarding not only the product's functionality but also several extra-functional characteristics. The majority of extra-functional product claims that are regulated under U.S. law are those which pertain to the production or composition of the product in question: where the product was made,[2] the ingredients or composition of a product,[3] and

[2] Under the Tariff Act, U.S. Customs requires that, unless excepted, every article of foreign origin (or its container) imported into the United States be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the item permits and in a manner that indicates the English name of a country of origin. Tariff Act, 19 U.S.C. § 1304 (1999); *see also* 19 C.F.R. § 134.11 (2003).

[3] In 1990, Congress enacted the Nutrition Labeling and Education Act (NLEA), a statute aimed at substantially reforming federal regulation of food product labeling to enable consumers to make more informed choices about their diets. Pub. L. No. 101-535, 104 Stat. 2353 (1990) (codified in various sections of 21 U.S.C.). *See also* Textile Fiber Products Identification Act, 15 U.S.C. § 70 (1997) (requiring the labeling of the textile content of garments).

the potential health or environmental effects of a product's manufacture and use.[4] The statements at issue in this case are assertions about similar extra-functional characteristics of Nike products: namely, the characteristics of the labor input required to manufacture Nike brand shoes and the environmental and health effects of the manufacturing processes.

The California Supreme Court decision below should be affirmed because it protects the American consumer's long-standing interest in ensuring honest product representation. *Kasky v. Nike, Inc.*, 93 Cal.Rpt.2d 854 (Cal. 2002) ("[W]hen a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully."). Should the Court reject the California Supreme Court decision, corporations could seek to deliberately mislead consumers as to the components and assembly of their products merely by cloaking their misrepresentations in the language of public debate.

II. NIKE STOOD TO BENEFIT ECONOMICALLY BY MAKING THE ALLEGED FACTUAL MISREPRESENTATIONS.

A. Academic studies show that consumers would change their purchasing behavior to avoid

[4] *See* Organic Certification, 7 U.S.C.A. § 6501 (1999) (purpose of certification to assure consumers that organically produced products meet a consistent standard); 16 C.F.R. § 260.2 (2003) ("The guides apply to any claim about the environmental attributes of a product, package or service in connection with the sale, offering for sale, or marketing of such product, package or service for personal, family or household use, or for commercial, institutional or industrial use."). *See also* 42 U.S.C.A. § 14301(2) (2003) (stating that uniform national labeling requirements for regulated batteries, rechargeable consumer products, and product packaging will significantly benefit programs for regulated battery collection and recycling or proper disposal).

products made under "sweatshop" manufacturing practices.

The Ninth Circuit has recognized that consumers evaluate aspects of a manufacturer's or product's social responsibility as part of their purchasing decisions. *See Association of Nat'l Advertisers, Inc. v. Lungren*, 44 F.3d 726, 733 (9th Cir., 1994) (noting that the statutes in question gave consumers information permitting them to make rational product comparisons and tradeoffs in price versus ecological "greenness"). Marymount University gathered polling data about consumer purchasing behavior specific to the apparel industry in 1995, 1996, and 1999 ("Marymount Studies").[5] For each of these years, over 75% of the consumers polled stated that

[5] Marymount University, Center for Ethical Concerns, *The Consumer and Sweatshops*, at http://www.marymount.edu/news/garmentstudy/overview.html (last visited Mar. 20, 2003) [hereinafter "Marymount Studies"]. The Marymount Studies, three separate surveys conducted by International Communications Research in 1995, 1996, and 1999, were each surveys of national random samples of approximately 1,000 of adults over eighteen years of age, half male and half female. *Id.* Data was weighted to reflect the U.S. population eighteen years of age and older, and the margin of error at the 95% level of confidence on a sample of this size is +/- 3.08%. *Id.* Although the surveys were not published outside of Marymount University's website, the Marymount Studies have been cited widely by the press, as well as by academics and the government. *See* Ellen Neuborne, *Consumers Frown On Sweatshops*, USA Today, Nov. 17, 1995 at 1B; Heather Hiam-White, *A Look At . . . Manufacturing Christmas: Their Labor, Our Gifts, Your Choices*, Washington Post, Dec. 20, 1998 at C3; U.S. Newswire, *Marymount University Survey: Consumers Don't Want Sweatshops*, Dec. 6, 1999; Robert Pollin *et. al.*, *Global Apparel Production and Sweatshop Labor: Can Retail Prices Finance Living Wages* 3 Political Economy Research Institute, University of Mass. Amherst (2002); Kimberly Ann Elliott and Richard Freeman, *White Hats or Don Quixotes? Human Rights Vigilantes in the Global Economy*, NBER Working Paper No. 8102 (Jan. 2001); Bureau of Int'l Labor Affairs, Dept. of Labor, *By the Sweat and Toil of Children, Vol. IV: Consumer Labels and Child Labor* (1997), available at http//www.dol.gov/ILAB/media/reports/ iclp/sweat4/overview.htm.

they would not shop at a retailer if they were aware that the garments sold at that retailer were made under "sweatshop conditions."[6] The definition of a sweatshop used in the survey was a place of manufacture in which "[employees] are forced to work long hours under extremely poor working conditions for less than minimum wage." A 1999 National Bureau of Economic Research (NBER) survey of consumers found similar results.[7] Eighty-four percent of respondents in that survey stated that they cared about the condition of workers who make the clothing they buy (46% indicated "a lot"; 38% indicated "somewhat"). As a result, 65% of those surveyed indicated that they would not buy a t-shirt made under "poor conditions" at all.[8] Furthermore, Nike, like most other major sports shoe brands, produces apparel as well as footwear.[9] These studies suggest that a corporation's brand strength, market share, revenues, and profitability could suf-

[6] Marymount Studies, *supra* note 5. The exact percentages were 78% in 1995, 79% in 1996 and 75% in 1999. *Id.*

[7] Kimberly Ann Elliott and Richard Freeman, *White Hats or Don Quixotes? Human Rights Vigilantes in the Global Economy*, NBER Working Paper No. 8102 (January 2001) [hereinafter "NBER Study"]. The polling pool in the NBER Study was randomly chosen, split sample design (posing different questions to different groups to see if responses varied with presentation of words or questions) conducted by Springfield Telemarketing. *Id* at 5. The sample size was 726. Telephone interview with Richard Freeman, co-author of NBER Study, Herbert Ascherman Chair in Economics at Harvard University (Mar. 15, 2003). There was not a survey-specialized definition of "poor conditions," "good conditions." *Id.*

[8] NBER Study, *supra* note 7 at 55-56.

[9] Nike, with other shoe producers such as Reebok, L.L.Bean and Patagonia, were original members of the Clinton Administration's 1996 Apparel Industry Partnership, formed to create labor standards for the apparel and footwear industry. *Labor Standards to Get Broad Input*, Journal of Commerce, Nov. 5, 1996 at 3A.

fer substantially from having its products identified as being manufactured under these "sweatshop" working conditions.[10]

Studies that indicated a stated willingness on the part of consumers to pay a premium for products made in "sweatshop-free" conditions further suggest that the labor component of a corporation's product is an extra-functional product characteristic that is discretely valued by the consumer. A 1999 study by the Program on International Policy Attitudes (PIPA) found that if consumers were given the choice between a less expensive garment made in harsh and unsafe working conditions, and a more expensive garment certified as not being made in such sweatshop conditions, 75.7% of respondents indicated that they would purchase the more expensive shirt made in a safe and healthy working environment. The premium presented for the more expensive garment was $5.00.[11] The aforementioned 1999

[10] Sweatshop is defined as "a usually small manufacturing establishment employing workers under unfair and unsanitary conditions." Webster's Unabridged Dictionary 2308 (3d ed., 1993).

[11] Maryland University, Program on International Policy Attitudes (2000), *American Globalization* at http://www.pipa.org/OnlineReports/Globalization/global_rep.html (last visited Mar. 25, 2003). [hereinafter PIPA Study]. The Program on International Policy Attitudes (PIPA) is a joint program between the Center for Policy Attitudes and the Center for International and Security Studies, School of Public Affairs, Maryland University. *Id.* The PIPA poll was conducted by Research Data Design and Communications Center, Inc. on October 21-29, 1999, with a sample of 1,826 American adults (18 years or older). *Id.* Respondents were chosen from all households in the continental United States by a random digit-dialing sample, and were interviewed by telephone, using a survey designed by PIPA. *Id.* Interviewers observed gender and region quotas, and questions that were asked of the entire sample have a margin of error of +/- 2.3%. *Id.* This survey was also broadly reported in the press. *See* Richard Morin and Claudia Deane, *The Ideas Industry; Pointed Parody May Be Price of Success*, The Washington Post, Feb. 15, 2000 at A21; *World Trade Body Comes Under Fire Before Talks Open; Buchanan*

NBER study corroborated this finding, with 81% of respondents indicating they would pay more for an item if they could be assured it was made under "good conditions." For a $10 item, consumers were willing to pay $2.78 more; for a $100 item, consumers were willing to pay $14.99 more. The Marymount Studies echoed this finding, with consumers stating their willingness to pay incrementally more for a garment if they knew that the garment was manufactured in a "legitimate shop".[12] For the years 1995, 1996 and 1999, at least 83% of the consumers polled stated they would pay a $1 premium on a $20 garment, if it were guaranteed that the garment was produced in a "lēgitimate shop".[13] This survey data indicates that consumers evaluate and value the labor and conditions surrounding a product's assembly as a discrete, extra-functional component in their purchasing decisions.

B. The working conditions in Nike subcontract factories were harsh and unsafe, correlating with what consumers defined as "sweatshops."

The Respondent's Complaint cites a Nike-commissioned audit conducted by Ernst & Young of the Tae Kwang Vina plant ("VT") in Vietnam that catalogued several serious

Assails U.S. Accord With China As a Giveaway; Teamsters Blast "Corporate Greed," St. Louis Post-Dispatch, Nov. 29, 1999 at A1.

[12] "Legitimate shop" was undefined in the survey. Marymount studies, *supra* note 5. The common definition of legitimate in this context is "conforming to recognized principles or accepted rules and standards." Webster's Unabridged Dictionary 1291 (3d ed., 1993).

[13] The exact percentages were 84% in 1995, 83% in 1996 and 86% in 1999. Marymount Studies *supra* note 5.

health and safety violations.[14] This Ernst & Young audit stated that the acceptable levels of toluene, a solvent used in sneaker production, exceeded the Vietnamese legal limit from 6 to 177 times. Compl. ¶ 42.

Toluene is a hazardous air pollutant,[15] and numerous studies have documented its ill effects on humans. In studies of workers repeatedly exposed to toluene at lower concentrations, from 30 to 150 parts per million ("ppm"), workers exhibited performance deficits in neurobehavioral tests, hearing loss, and vision color impairment.[16] In the mid-1990s studies of persistent inhalation exposure to toluene between 4,000—12,000 ppm, showed evidence of residual or permanent neurological damage as evidenced by structural changes in the brain—tremors, paranoid psychosis, recurrent hallucinations, impaired speech, hearing and vision, and death.[17] Toluene exposure can also cause significant physical damage to the human tissues and organs, including the liver,

[14] Steven Greenhouse, *Nike Shoe Plant in Vietnam Is Called Unsafe for Workers*, The New York Times, Nov. 8, 1997 at A1. *See also* Tim Connor, *Still Waiting for Nike to Do It* 7-9 (Global Exchange, 2001).

[15] As listed by the EPA. Agency for Toxic Substances and Disease Registry, *Toxicological Profile For Toluene* 222 (U.S. Department of Health and Human Services, Public Health Service) (2000) [hereinafter "ATSDR Toluene Toxicological Profile"].

[16] *Id.* at 60 - 64 (citing K.W. Boey, S.C. Foo, J. Jeyaratnam, *Effects of Occupational Exposure to Toluene: A Neuropsychological Study on Workers in Singapore*, 26(2) Ann. Acad. Med. Singapore 84-7 (1997); C. Abbate, C. Giorgianni, F. Munao, *et. al.*, *Neurotoxicity Induced by Exposure to Toluene. An Electrophysiologic Study*, 64 Int. Arch. Occup. Environ. Health 389-392 (1993); M. Zavalic, Z. Mandic, R. Turk, *et. al.*, *Quantitative Assessment of Color Vision Impairment in Workers Exposed to Toluene*. 33(3) Am. J. Ind. Med. 297-304 (1998); M. Zavalic, Z. Mandic, R. Turk, *et. al.*, *Assessment of Color Vision Impairment in Male Workers Exposed to Toluene Generally Above Occupational Exposure Limits*. 48(3) Occup. Med. 175-180 (1998)).

[17] *Id.* at 59.

kidneys, skin, and eyes.[18] Repeated exposure and high levels of toluene have been linked to developmental problems in children born to female workers exposed during pregnancy. The Agency for Toxic Substances and Disease Registry ("ATSDR") has equated the prenatal effect of inhaling large amounts of toluene and other solvents during pregnancy with fetal alcohol syndrome.[19] Relevant studies reported growth deficiencies, central nervous system abnormalities, and limb deformations in fetuses exposed to high levels of toluene.[20]

The Ernst and Young audit of the VT factory in Vietnam also stated that the level of acetone exceeded the acceptable standard from six to eleven times. Compl. ¶ 42. These levels appear to be sufficient to cause significant adverse effects. According to relevant studies, neurological and behavioral effects such as chronic headache, lack of energy, general weakness, and delayed visual reaction time have been observed in humans exposed to 250 ppm acetone for 5.25 hours or repeatedly for 6 hours/day for 6 days.[21] Lightheadedness and throat irritation are evident at 1000 ppm.[22] The Ernst & Young reports suggests that an individual working at the VT factory in 1996 was at risk for serious and permanent injury—and this would be true even accepting the two- to three-year exposure limit for contract workers claimed by Nike. Compl. ¶ 44. Thus, these conditions, if reported accurately by Ernst & Young, would meet the definition of

[18] Tim Connor, *Still Waiting for Nike to Do It* 7—9 (Global Exchange, 2001) (citing ATSDR Tolunene Toxicological Profile).

[19] ATSDR Toluene Toxicological Profile, *supra* note 15 at 136.

[20] *Id.*

[21] Agency for Toxic Substances and Disease Registry, *Toxicological Profile for Acetone*. 92 (U.S. Department of Health and Human Services, Public Health Service) (2000).

[22] *Id.* at 24.

unhealthy, "sweatshop" working conditions as measured by the aforementioned survey data.[23]

The Respondent's Complaint also highlights alleged instances of harsh treatment of workers in Nike's Vietnamese subcontractor factories. Alleged instances of corporal punishment by supervisors in Nike subcontract factories include: forcing female workers to run around a track as punishment for wearing non-regulation shoes, forbidding workers from using the bathroom more than once in an eight-hour shift, and striking workers on the head for poor sewing performance. Compl. ¶ 29. According to the Vietnam labor code, employers may discipline employees in only three ways: by verbal or written reprimand, transfer to lower pay for a limited term, or dismissal.[24] In all cases, disciplined employees have the right to present their own case or to ask for the assistance of a lawyer, a people's defense counsel, or other person for their defense.[25]

Additionally, the Complaint gave specific instances in Vietnam and China in which workers in Nike subcontractor factories were required to work illegally long hours. At the Wellco Plant in China, the Asia Monitor Resource Center reported that the factory required workers to work eleven hours each day, and granted only one to two days off every month. Compl. ¶ 32. At the Yue Yuen Factory, also in China, workers were reported as working ten to twelve hours a day, six or seven days a week, plus an additional two hours of overtime each day. Compl. ¶ 32. Such excessive, compulsory working hours contravene China's labor code: the

[23] *See supra* notes 5—13 and accompanying text.

[24] Vietnam Labor Code Art. 84 (1994).

[25] Vietnam Labor Code Art. 87 (1994).

code mandates that workers are required to have one day off in seven,[26] and that workers shall not work more than eight hours a day, or forty-four hours a week on average.[27]

The Complaint cited similar violations in the Vietnamese manufacturing facilities: The Ernst &Young audit of the VT factory examined the payroll of fifty workers at the VT plant; forty-eight of those employees had been required to work overtime. Compl. ¶ 34. Vietnam Labor Watch reported that most workers who make Nike products are forced to work 500 hours or more of overtime. Compl. ¶ 36.The Vietnam labor code states that overtime is allowed, but shall not exceed four hours in a day and 200 hours in a year.[28] Therefore, the Complaint's descriptions of such mandatory, immoderate hours of work in Nike subcontract factories would meet the requisite "long hours" of sweatshop working conditions, as measured by survey data discussed above.[29]

C. Nike's statements represented their subcontract factories as providing safe and healthy work environments.

The Respondent's Complaint cites several instances in which Nike stated that the working conditions in its subcontractor factories met relevant governmental and internal standards. Nike's 1996 Memorandum of Understanding established that Nike assumes responsibility for ensuring that subcontractors comply with applicable governmental health and safety standards. Compl. ¶ 39. In a 1996 letter to

[26] China Labor Code, Art. 38 (1994). China's labor code does allow for the working hours to be extended due to the "requirements of production" but puts limits such extensions to three hours per day, not to exceed 36 hours in a month. *Id* at Art. 41.

[27] China Labor Code, Art. 36 (1994).

[28] Vietnam Labor Code, Art. 69 (1994).

[29] *See supra* notes 5—13 and accompanying text.

University Presidents and Athletic Directors, Nike represented that the Nike Memorandum of Understanding certifies Nike compliance with "applicable government regulations regarding occupational health and safety." Compl. ¶ 39. Additionally, in a widely distributed press release, "The Nike Code of Conduct: What it is, How it Works" Nike represented that "key provisions of the code include: . . . zero tolerance of corporal punishment or abuse, or of harassment of any kind." Compl. ¶ 28. Therefore, it is reasonable to believe that consumers reading Nike's statements with confidence would infer that Nike employed subcontractors that provided safe and healthy working conditions for their employees.

D. It is reasonable to assume that Nike's alleged factual misrepresentations had a beneficial effect on product sales.

Academic survey data indicates that consumers in the last half of the 1990s would change their purchasing behavior if they knew a corporation's products were manufactured under "sweatshop" conditions. The unsafe and unhealthy working conditions at Nike subcontract factories alleged in the Respondent Complaint correspond with what polled consumers would have likely deemed "sweatshop" practices. Therefore it is reasonable to assume that Nike's representations of its subcontractors as operating safe and healthy work environments provided Nike with material benefit, by permitting it to avoid a loss of brand strength, shoe and apparel product sales, and overall corporate profitability.

The alleged misrepresentations made by Nike concern how and in what manner their products are made. These extra-functional product characteristics are of material import to consumers and are similar to those that this Court and U.S. society have considered inherently commercial. Consumers have indicated that they value the character of the labor input

into a product just as they would any other product attribute. Nike's likely economic benefit from these representations concerning its manufacturing practices is a further indication that the speech in question should not be considered political or creative, but commercial.

CONCLUSION

Factual misrepresentations made by corporations are simply not entitled to constitutional protection. Such restrictions on commercial speech have long been recognized. In this respect, the decision of the California Supreme Court merely reaffirms a basic commitment to truth and honesty in commercial transactions. For these reasons, *amicus* respectfully urges the Court to affirm the judgment of the California Supreme Court.

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